

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARVIN JOHNSON AND INDIAN RIVER CUSTODIAL	>:	
ASSOCIATION, DSEA/NEA,	:	
	:	
Petitioners,	:	
	:	Declaratory Statement
AND	:	
	:	<u>D.S. No. 06-06-527</u>
INDIAN RIVER SCHOOL DISTRICT,	:	
	:	
Respondent.	:	

Appearances

Tasha M. Stevens, Esq., Fuqua & Yori, PA, for the Grievant

Jeffrey M. Taschner, Esq., General Counsel, Delaware State Education Association

David H. Williams, Esq. and James H. McMackin, III, Esq., Morris James, LLP, for the District

BACKGROUND

The Indian River School District (“District”) is a “public school employer” within the meaning of §4002(n) of the Public School Employment Relations Act (14 Del.C. Chapter 40, “PSERA”).

The Indian River Custodial Association, DSEA/NEA (“Association” or “IRCA”), is an “employee organization” which admits to membership employees of a public school employer and has as one of its purposes the representation of those Indian River School District employees in collective bargaining. 14 Del.C. §4002(h). Specifically, the Association represents a bargaining unit of “all custodial employees exclusive of administrative and supervisory personnel.”¹

¹ Collective bargaining agreement between IRCA, DSEA/NEA and Indian River School District Board of Education, July 1, 2003 – June 30, 2008, Article II, Association Recognition, Section 1 (B).

At all times relevant to this matter, the District and IRCA have been parties to a collective bargaining agreement, which term extends from July 1, 2003 through June 30, 2008.

Marvin Johnson (“Grievant” or “Mr. Johnson”) is a public school employee within the meaning of 14 Del.C. §4002(m).

On or about December 14, 2005, Mr. Johnson was terminated from his employment as a custodian with the Indian River School District. Mr. Johnson appealed his termination to the Board of Education; following a hearing before the Board on May 4, 2006, by letter dated June 2, 2006, the Board upheld Mr. Johnson’s termination.

On or about June 9, 2006, the President of IRCA executed a “Consent to Private Representation in Prosecution of Grievance of Marvin Johnson”:

The Association, hereby, waives its rights, obligations, and responsibilities to act as the sole and exclusive collective bargaining agent for Marvin Johnson regarding his discharge and subsequent grievance. The Association, likewise, consents to Marvin Johnson’s representation and prosecution of his Grievance through private counsel or representation of his choice. It, therefore, will not be responsible for the costs, fees, and/or expenses associated therewith; the expenses incurred are the sole responsibility of Marvin Johnson.

On or about June 14, 2006, Mr. Johnson filed a Demand for Arbitration with the Public Employment Relations Board, pursuant to Article IV, Grievance Procedures, of the parties’ collective bargaining agreement, and 14 Del.C. §4013.² On or about July 14, 2007, the District filed a Motion to Dismiss which stated:

² 14 Del.C. §4013(c): ² For those terms and conditions that are negotiated pursuant to State law, the public school employer and the exclusive bargaining representative shall negotiate written grievance procedures ending in binding arbitration by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement. The written grievance procedures shall be included in any agreement entered into between the public school employer and the exclusive bargaining representative, and shall include:

- (1) a provision to limit binding arbitration to claims that the terms of the collective bargaining agreement have been violated, misinterpreted, or misapplied;
- (2) a provision to prohibit claims relating to the following matters from being processed through binding arbitration:

1. The Demand for Grievance is based upon the incorrect and inaccurate claim that it is a Level Four request for arbitration from a decision of the Indian River School District at Level Three of the grievance procedure under the Collective Bargaining Agreement with the Indian River Custodial Association (July 1, 2003 – June 30, 2008).
2. As indicated in the grievance procedure, a Level Four grievance can only be taken “If the Association is not satisfied with the Level Three decision or if no decision was rendered within the specified time, the Association may, within ten (10) days of receipt of the decision or within ten (10) days of the time limit for receipt, submit a request for arbitration to the superintendent via certified mail. Neither Marvin Johnson nor the Indian River Custodial Association ever filed a grievance under the grievance procedure and without an underlying grievance this claim has no legal basis and the Board has no jurisdiction.
3. The chronology of events leading to Mr. Johnson being terminated as a custodian in the Indian River School District are as follows:

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- (i) dismissal or nonrenewal of employees covered by Chapter 14 of Title 14;
 - (ii) dismissal or nonrenewal of employees not covered by Chapter 14 of Title 14 unless the controlling collective bargaining agreement provides that such matters are subject to binding arbitration;
 - (iii) Delaware law;
 - (iv) rules and regulations of the Delaware Department of Education or State Board of Education;
 - (v) the content of or conclusions reached in employee observations and evaluations unless the controlling collective bargaining agreement for employees not covered by Chapter 14 of Title 14 provides that such matters are subject to binding arbitration;
 - (vi) federal law;
 - (vii) rules and regulations of the United States Department of Education;
 - (viii) policies of the local school board; and
 - (ix) matters beyond the scope of the public school employer’s authority;
 - (3) a provision to select arbitrators by lottery from a panel of qualified arbitrators designated by the Public Employment Relations Board. In designating the panel, the Public Employment Relations Board shall prefer former judges who served on a Delaware constitutional court or on the United States District Court for the District of Delaware, and shall supplement the panel by adding qualified labor arbitrators;
 - (4) a provision to empower the Public Employment Relations Board to administer arbitration pursuant to regulations adopted by the Public Employment Relations Board;
 - (5) a provision to require that disputes relating to whether a matter is arbitrable be ruled upon by the arbitrator prior to hearing the merits of the dispute, and, if the arbitrator determines that the dispute is arbitrable, a provision to require that the same arbitrator schedule a second day of hearing to hear the merits of the dispute;
 - (6) a provision to assess against the losing party the arbitrator’s fees and expenses incurred in determining whether a dispute is arbitrable;
 - (7) a provision to require that the arbitrator’s fees and expenses incurred in deciding the merits of a dispute be evenly divided between the parties.

- A. On December 12, 2005, a pre-termination meeting was held with Mr. Johnson and his IREA representative meeting with Mr. Earl Savage, Assistant Superintendent.
 - B. By letter dated December 14, 2005, Lois M. Hobbs, Superintendent sent a certified letter to Mr. Johnson notifying him that he was being terminated for a pattern of inappropriate behavior involving his making statements including sexual references and sexual innuendo to female employees of the District which was intimidating, inflammatory and violated the District's policy on staff ethics and sexual harassment.
 - C. The termination letter referred to in the foregoing paragraph, notified Mr. Johnson of his right to appeal the termination decision to the Board of Education and request a board hearing. By letter from Mr. Johnson's attorney dated February 16, 2006, Mr. Johnson requested a hearing before the Board of Education.
 - D. On March 8, 2006 the Board of Education held a due process hearing where the burden of proof was on the Administration to prove the allegations against Johnson by substantial evidence. In connection with that hearing, the Board followed its Rules of Procedure and thereafter issued its decision upholding the termination as being "justified and appropriate under the circumstances of this case."
 - E. At the aforesaid due process hearing, Mr. Johnson was represented by Tasha Marie Stevens, Esquire, the District Administration was represented by James D. Griffin, Esquire and the Board of Education was represented by special counsel, Norman C. Barnett, Esquire.
 - F. By failing to file a grievance and thereafter electing to request an appeal hearing before the Board of Education on the issue of his termination, Mr. Johnson waived any right to a grievance under the collective bargaining Agreement.
4. In order for the former employee to request grievance arbitration he would have been required by the grievance procedure contained in the Collective Bargaining Agreement to file a Level I grievance within 35 days of the occurrence. The occurrence date would have been his termination which was effective on December 13, 2005. As of the date of this Motion, a Level I grievance has never been filed. Without a grievance having been filed and proceeding through Levels I, II and III, as described in the grievance procedure, there is no basis for the former employee to file a Demand for Grievance Arbitration and to ask that such request be treated as a Level Four grievance under Title 14, Chapter 40 of the PSERA.
 5. The authority of the Public Employment Relations Board is to consider and dispose of complaints of unfair labor practices as defined in 14 Delaware Code, § 4007. The alleged grievant in this matter has not filed an unfair labor practice and therefore there is no basis for jurisdiction or the requested action by PERB to appoint an arbitrator.
 6. Matters involving dismissal of employees was specifically excluded from the types of claims that could be appealed to binding arbitration by 14 Delaware Code, § 4013 (c) (2) b. which includes the "Dismissal or non-renewal of employees not covered by Chapter 14 of this Title, unless the controlling Collective Bargaining Agreement

provides that such matters are subject to binding arbitration”. The grievance procedure does not indicate that such matters are subject to binding arbitration.

7. In addition, 14 Delaware Code, § 4013 (c) (2) (h) specifically excludes “Policies of the local school board” and the alleged grievant’s violation of such policies resulted in his termination. Since matters related to dismissal or non-renewal of employees and policies of the local school board are specifically excluded from binding arbitration, PERB does not have authority to appoint an arbitrator or to exercise jurisdiction over the subject matter of this claim.
8. Neither the Public Employment Relations Board nor an arbitrator appointed by that Board has jurisdiction to review or alter a decision of the Indian River School District regarding dismissal or non-renewal of an employee, since, in addition to those matters being excluded from PERB’s jurisdiction, Delaware law grants sole jurisdiction of those matters to local Boards of Education pursuant to 14 Delaware Code, § 1049 which grants the school districts the right to prescribe rules and regulations for the conduct and management of the schools (including the right to adopt board policies) and to appoint and terminate personnel. See § 1049 (2) and (9).
9. PERB should deny the request of the alleged grievant to appoint an arbitrator, since PERB does not have jurisdiction over the matter raised in the Demand for Arbitration. Further, an arbitrator’s right to rule on matters of arbitrability include only procedural matters but not substantive matters and the issue of whether a local school board had the right to terminate a non-certified employee is purely a substantive issue.
10. Under the applicable Collective Bargaining Agreement Article IV D. 5 describes the requirements for filing a Level Four grievance. Subsection 5.a. provides that “If the Association is not satisfied with the Level Three decision, or, if no decision was rendered within a specified time, the Association may, within ten (10) days of receipt of the decision or within ten (10) days of the time limit for receipt, submit a request for Arbitration to the Superintendent via certified mail.” (Emphasis added) The Demand for Grievance Arbitration filed with PERB includes a waiver dated June 9, 2006, executed by the Indian River Custodial Association which provides that the Association waives its rights, obligations and responsibilities to act as the agent for Marvin Johnson regarding his discharge. Since a Level Four grievance must be filed by the Association and the Association has waived all rights and obligations to act as the agent for the former employee, there is no right available to the former employee to demand grievance arbitration under Level Four of the applicable Collective Bargaining Agreement.

The Public Employment Relations Board forwarded the District’s Motion to Dismiss to both the Grievant and the IRCA for response because the Motion raised a question of first impression under 14 Del.C. §4013, namely substantive arbitrability.

The Grievant responded to the Motion to Dismiss on or about August 16, 2006, asserting the procedural defense of failure to follow the first three levels of the grievance procedure should be dismissed because his termination had already been reviewed by the Board of Education.

Consequently, having a grievance heard by the immediate supervisor (Level 1), the Head Custodian (Level 2) and/or the Superintendent (who had already met with the grievant and recommended his termination) would have been an exercise in futility which is not required under the law. *Potter v. Pilots' Assn. for Bay and River Delaware*, 1992 Del. Super. Lexis 218, 11 -12.

The Grievant also alleges that the District mischaracterized the grievance as only asserting a violation of local School Board policy; the grievance, in fact, alleges a violation of Article XVI, ¶ 11 of the collective bargaining agreement, which requires just cause for termination of custodial employees. The Grievant refutes the District's assertion that he has waived his right to use the grievance procedure, including arbitration, because he chose to use private counsel based on Article IV(c)(3) of the collective bargaining agreement which provides employees with the right to be represented "by an attorney at the Grievant's option" at any and all levels of the grievance procedure.

The IRCA responded to the District's Motion to Dismiss on or about August 17, 2006, asserting a pre-termination hearing before the Board of Education is separate and distinct from the contractual grievance procedure. In fact, the IRCA argues, there was no proper grievance of the termination until after the District finalized its termination decision by letter dated June 2, 2006.

The IRCA argues the District errs in its reading of the law when it asserts PERB does not have jurisdiction to appoint a grievance arbitrator because there is no pending unfair labor practice charge. It also refutes the District's assertion that termination of custodial employees is not subject to binding arbitration under the collective bargaining agreement. It notes that Article XVI provides that "no employee shall be discharged, disciplined, or reduced in rank without just cause," and that Article IV(A)(1) defines a grievance to be a claim that there has been a violation or inequitable application of any of the provisions of the contract.

Finally, the IRCA argues the District misconstrues the intent of the IRCA in signing the release for the Grievant to use a private attorney in pursuing the grievance to arbitration noting,

“... the document recognizes that since Johnson is not an Association member, the Association will not be responsible for the costs of his representation by private counsel. More specific to the issue raised by the District, the document clearly indicates the Association’s consent to Johnson prosecution of this grievance.” *Association Submission in Response to the District’s Motion to Dismiss*, August 17, 2006, p. 3.

By letter dated August 25, 2006, PERB advised the parties a review of the pleadings identified two issues, namely:

1. Whether Mr. Johnson’s termination is substantively arbitrable under the terms of the collective bargaining agreement between the District and the Indian River Custodial Association? And
2. Whether the Indian River Custodial Association has the authority to unilaterally assign its statutory and contractual responsibility to represent Mr. Johnson to a third party?

The Grievance Arbitration Request was converted to a Request for Declaratory Statement because it concerned “the application of a statutory provision” (i.e., 14 Del.C. §4013(c)), it involved the rights and/or statutory obligations of a party, asserts a statutory claim against a public employer, involves parties whose interests are real and adverse, and was postured such that issuance of the statement would facilitate resolution of the controversy. PERB Reg. 6.1.

A hearing was convened on October 10, 2006, at which the parties were afforded the opportunity to present documentary and testimonial evidence. A copy of the complete transcript was provided to each party and responsive argument was filed, culminating with the receipt of the final brief on January 30, 2007.

This decision results from the record thus created by the parties.

ISSUE

- 1) IS THE GRIEVANCE SUBSTANTIVELY ARBITRABLE UNDER THE TERMS
OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE DISTRICT
AND THE INDIAN RIVER CUSTODIAL ASSOCIATION?, AND IF SO,

- 2) DOES THE INDIAN RIVER CUSTODIAL ASSOCIATION HAVE THE
AUTHORITY TO UNILATERALLY ASSIGN ITS STATUTORY AND
CONTRACTUAL RESPONSIBILITIES TO REPRESENT THE GRIEVANT TO A
THIRD PARTY?

OPINION

Prior to a consideration of the merits of this petition, it must first be established that this matter is properly postured for issuance of a declaratory statement. The Public Employment Relations Board is statutorily directed,

- (4) To provide by rule a procedure for the filing and prompt disposition of petitions for a declaratory statement as to the applicability of any provision of this chapter or any rule or order of the Board. Such procedures shall provide for, but not be limited to, an expeditious determination of questions relating to potential unfair labor practices and to questions relating to whether a matter in dispute is within the scope of collective bargaining. 14 Del.C. §4006(h)(4).

Unlike unfair labor practice charges which assert the statute has been violated and request remediation of the asserted wrongs, a declaratory statement addresses questions concerning applicability of statutory provisions and/or PERB rulings. *Bourdon v. Del. Office of State Personnel & DHSS*, DS 03-08-400, V PERB 3039, 3044 (2004).

PERB Regulation 6, Petitions for Declaratory Statements, defines the procedural requirements for petitions for declaratory statements:

6.1 Filing of a Petition

- ... (b) A petition may be filed when there exists a controversy concerning:
- (1) A potential unfair labor practice;
 - (2) Whether a matter is within the scope of collective bargaining as defined by statute; or
 - (3) The application of any statutory provision or regulation or order of the Board.

The instant petition questions the scope and application of the grievance arbitration provision of the Public School Employment Relations Act, 14 Del.C. §4013(c). The petition therefore meets the requirements of subsection (b)(3) of PERB Rule 6.1.

PERB Regulation 6.1 further requires that a proper petition concern a “controversy” which must meet the following criteria:

- (c) A controversy exists within the meaning of this Regulation when:
 - (1) The controversy involves the rights and/or statutory obligations of a party seeking a declaratory statement;
 - (2) The party seeking the declaratory statement is asserting a statutory claim or right against a public employer, an exclusive representative or a public employee who has an interest in contesting that claim or right;
 - (3) The controversy is between parties whose interests are real and adverse; and
 - (4) The matter has matured and is in such a posture that the issuance of a declaratory statement by the Board will facilitate the resolution of the controversy.

This dispute concerns the obligations of the District to arbitrate a grievance concerning the discharge of a custodial employee. Under the National Labor Relations Act, a case for specific enforcement of a purported agreement to arbitrate can be brought in federal court under Section 301(a).³ *Textile Workers v. Lincoln Mills*, 353 US 448, 40 LRRM 2113 (1957). There is no corollary to this federal provision under Delaware public sector collective bargaining laws. The PSERA does, however, provide that the Public Employment Relations Board is responsible for the interpretation and administration of the statute. 14 Del.C. §4001. Consequently, where the parties have not agreed to submit questions of substantive arbitrability to the arbitrator, PERB will accept jurisdiction.

³ “Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to citizenship of the parties.” 61 Stat. 156 (1947).

This substantive arbitrability issue is a question of first impression and is mature and ripe for resolution because there can be no resolution of the underlying grievance until this question is resolved.

I. SUBSTANTIVE ARBITRABILITY

The issue of substantive arbitrability is placed before PERB by the District's motion to dismiss the petition based on lack of jurisdiction. It is well established under Delaware law, that it is appropriate to look to the federal precedent in resolving questions under State collective bargaining law because of the similarities between the federal and state labor schemes. Wilmington v. FOP Lodge 1, CA 200244 NC, Del. Chan. (2003); *Wilmington v. Wilmington Firefighters Local 1590*, 385 A. 2d 720, 723 (Del. 1978); *Cofrancesco v. City of Wilmington*, 419 F. Supp 109, 111 (D.Del 1976); *Del. Correctional Officers Association v. State*, 2003 WL 23021927 @ 7 (Del.Chan., 2003).

... Where it has been established that the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. Steelworkers v. Warrior & Gulf Navigation Co., 363 US 574, 46 LRRM 2423 (1960).

Subsection §4013 of the PSERA provides in relevant part:

For those terms and conditions that are negotiated pursuant to State law, the public school employer and the exclusive bargaining representative shall negotiate written grievance procedures ending in binding arbitration by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the interpretation and application of any term or terms of an existing collective bargaining agreement. The written grievance procedure shall be included in any agreement entered into between the public school employer and the exclusive bargaining representative, and shall include:

- (2) A provision to prohibit claims relating to the following matters from being processed through binding arbitration:

- (ii) dismissal or nonrenewal of employees not covered by Chapter 14 of Title 14⁴ unless the controlling collective bargaining agreement provides that such matters are subject to binding arbitration.

The 1996 through 2008⁵ collective bargaining agreements between the District and the Association defined a grievance as “... a claim that there has been a violation or inequitable application of any provisions of the contract.” Art. IV, A (1).

The negotiated grievance procedure is defined in Article IV and establishes a four level process. Beginning with the 1996-1999 agreement, the fourth step of the grievance procedure was before an arbitrator assigned through the American Arbitration Association. Specifically the 1996, 1999, and 2002 Agreements provide:

- a. If the Grievant is not satisfied with the Level Three Decision, or, if no decision was rendered within the specified time, the Grievant may, within ten (10) days of receipt of the decision or within ten (10) days of the time limit for receipt, submit a request for Arbitration to the Superintendent via certified mail with copies to the American Arbitration Association at its Philadelphia office. The American Arbitration Association shall process the request in accordance with its rules governing voluntary labor arbitration.
- b. The Arbitrator selected shall convene a hearing. He/she shall issue a written decision within thirty (30) days from the date that the hearing is closed. The Arbitrator is without authority to render any decision which would result in the violation of law or the violation of this agreement. The Arbitrator shall be without authority to amend, modify, vary, add to or subtract from the terms of the agreement. The decision of the Arbitrator shall be final and binding on the parties. All fees and expenses of the Arbitrator, including travel, meals and the cost of the hearing room, if any, shall be borne equally by the District and the Association. 1996-1999, 1999- 2002, 2002-2003 agreements, Article IV, §D(5).

The current collective bargaining agreement (2003 – 2008) included changes to both sections (a) and (b):

- a. If the Association is not satisfied with the Level Three Decision, or, if no decision was rendered within the specified time, the Association may, within ten (10) days of receipt of the decision or within ten (10)

⁴ 14 Del.C. Chapter 14, Procedures for the Termination of Services of Professional, commonly referred to as the “Teacher Tenure Act”.

⁵ There were four collective bargaining agreements between the District and the IRCA between 1991 and 2008, which terms included: July 1, 1996 – June 30, 1999 (D. Ex. 3); July 1, 1999 – June 30, 2002 (D. Ex. 2); July 1, 2002 – June 30, 2003 (D. Ex. 1); and July 1, 2003 – June 30, 2008.

days of the time limit for receipt, submit a request for Arbitration to the Superintendent via certified mail.

- b. The arbitration process shall be conducted pursuant to Title 14, Chapter 40 of the Delaware Code and the regulations of the Public Employment Relations Board. *(Changes are underlined)* 2003-2008 Agreement, Article IV, D, 5

It is undisputed that the modified contractual language was proposed by the Association at the parties' first negotiating meeting on or about March 4, 2004.⁶ This language is identical to the binding arbitration language included in the Agreement between the District and its certificated professionals bargaining unit. The testimony was consistent that this language was introduced into the professional unit agreement during the mediation of their 2003 - 2008 agreement. Unlike the 1996 – 2003 custodial agreements, the District's prior collective bargaining agreements with its professional staff did not include binding arbitration of grievances as the final step of the process during that period.

The unrefuted testimony of the District's former Director of Personnel and the stipulated testimony of two additional members of the Districts 2004 negotiating team was that the intent of the District in adopting the language of Article IV, §5, was to "follow the law [14 Del.C. §4013] as written."⁷

Both District and Association witnesses testified that since 1996, members of the custodial bargaining unit have enjoyed binding arbitration of all grievances, including arbitration of just cause for discharge. In each of the collective bargaining agreements submitted in this case, Article XVI, Association and Employee Rights, §11 provides:

No employee shall be discharged, disciplined or reduced in rank without just cause. Following a six month probationary period, an employee shall not be discharged without just cause.⁸

District and Association witnesses consistently testified that any discussions concerning the Association's proposed modifications to the contractual grievance procedure did not address

⁶ District Exhibit H

⁷ Testimony of Dr. Owen, transcript pages 12, 45, and 28.

the impact of the proposed changes on the continued arbitrability of discharge and non-renewals of custodial employees. The language of Article XVI, §11, requiring just cause for discharge did not change, nor did the definition of a grievance.

Dr. Owen testified he did not recall any conversations or discussions between the District and the Association team concerning custodians giving up the right to binding arbitration of grievances. He further testified, “We [the District] felt that the [modified] language [of Article IV, §5] clearly referenced the procedures the District would follow with regard to Level IV grievances⁹,” confirming that this section of the agreement was considered procedural.

The Association’s 2004 Chief Negotiator testified his team believed their proposed change to Article IV, §5(b) simply replaced the process by which an arbitrator would be selected, inserting the statutory PERB panel procedure for selection through the American Arbitration Association.¹⁰

Considering the testimony, the documentary evidence and the evolution of the contractual language, it is clear to me that the parties did not modify or delete the just cause for discharge provision of their agreement, nor did they act to remove this provision from being subject to binding arbitration. §4013(c)(2)(ii) prohibits binding arbitration for dismissal or nonrenewal of educational support employees, “unless the controlling collective bargaining agreement provides that such matters are subject to binding arbitration.” Based on the contractual and most recent negotiating history, the 2003-2008 collective bargaining agreement establishes that just cause for discharge is subject to binding arbitration.

The District has also argued that Mr. Johnson’s discharge is not subject to arbitration because it resulted from his violation of the District’s policies. Having negotiated a just cause standard for discharge with the Association, the impact of the District’s policy on staff ethics and

⁸ The grievant in this case has worked for the District in excess of 6 months and was not a probationary employee.

⁹ Dr. Owen, transcript p. 43.

¹⁰ Charlie Shaffer, transcript p. 54-55.

against harassment on his discharge will be resolved by the arbitrator as part of the consideration as to whether there was just cause.

There are a number of procedural defenses which the District raises to the arbitrability of the grievance, all of which turn on the application of the parties' collective bargaining agreement, including timeliness and failure to adhere to the grievance procedure by filing a demand for arbitration without first obtaining a decision at the lower levels of the process. Questions of procedural arbitrability are for the arbitrator in cases where it has been determined that the subject matter of a dispute is substantively arbitrable. It is the arbitrator who is charged with deciding questions of procedural arbitrability. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557-58, 55 LRRM 2769 (1964).

Finally, the District has also argued that the Grievant waived his right to grieve the discharge when he requested and received a hearing before the Indian River School Board of Education in May, 2006. In finding that a public school employee was denied due process when he was terminated and not provided the opportunity to appear before the Board of Education before it reached its decision to terminate, the Delaware District Court found, "The grievance procedure provided in the collective bargaining agreement was obviously unavailable until after the termination". *Hawkins v. Bd. of Education in Wilmington*, 468 F.Supp. 201 (D.Del). Consequently, the grievance procedure was not available to the Grievant unless and until his termination was finalized.

II. ASSIGNMENT OF REPRESENTATIONAL RESPONSIBILITY

The waiver question also turns on the application of Article IV, D§5(a) which establishes the Association's right to appeal a grievance to arbitration and its application to the June 6, 2006 "Consent to Private Representation in Prosecution of a Grievance", which was drafted by the grievant's attorney and executed by the Association President. As such, this is again a procedural arbitrability question that should properly be determined by the arbitrator.

The testimony and documentary evidence do raise concerns, however, under the statute as to whether a certified exclusive representative can waive its obligation to represent bargaining unit members based upon their union membership status. *IBEW v. Foust*, 442 US 42, 101 LRRM 2365 (1979).

As noted in the landmark US Supreme Court in *Vaca v. Sipes*, 386 US 171, 191, 64 LRRM 2369 (1967):

In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the Union contemplated that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time consuming step in the grievance procedure.

By allowing the union to negotiate the settlement of grievances within the stated time limits, the parties are assured similar grievances are treated consistently and “major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved,” thereby enhancing the union’s interest as the bargaining agent. *Vaca*, *Supra*.

As stated by the U. S District Court for Southern Florida in *Del Casal v. Eastern Airlines*, 101 LRRM 2062 (1979), applying the U.S. Supreme Court decisions in *Vaca* and *Hines v. Anchor Motor Freight, Inc.*, 424 US 554, 91 LRRM 2481 (1976), while an exclusive bargaining representative “has the power to determine under what conditions an attorney will be supplied to a grievant, non-membership is a factor which can play no part in its decision.”

Having voiced PERB concerns, the question of whether the grievance is procedurally sufficient for resolution must be decided by the arbitrator.

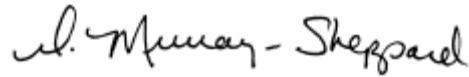
DECISION

For the reasons set forth above, the grievance of Marvin Johnson concerning his termination from employment is determined to be substantively arbitrable by operation of the 2003-2008 agreement between the parties and application of 14 Del.C. §4013(c).

Questions of procedural arbitrability are reserved to the consideration of the arbitrator and should be handled in accordance with the requirements of 14 Del.C. §4013 (c)(5).

WHEREFORE, the Public Employment Relations Board shall forthwith implement the process for assigning an arbitrator pursuant to PERB Rule 13.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "D. Murray-Sheppard", written over a horizontal line.

DEBORAH L. MURRAY-SHEPPARD
Hearing Officer, Delaware PERB

DATED: 31 MAY 2007